

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

12 UNITED STATES OF AMERICA	)	
	)	
13 Plaintiff,	)	3:98-cr-00108-HDM
	)	(CR-N-98-108-HDM(PHA))
14 vs.	)	
	)	
15 MATEO HERNANDEZ-DE LUNA, Inmate	)	
16 Number 45710,	)	ORDER
	)	
17 Defendant.	)	

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18 Defendant-prisoner Mateo Hernandez-De Luna pled guilty to a  
19 one-count violation of 8 U.S.C. 1326, Unlawful Reentry of a  
20 Deported Alien, on September 29, 1999. On January 24, 2000, he was  
21 sentenced by this court to seventy (70) months imprisonment to run  
22 consecutively to the undischarged term of imprisonment for case  
23 CR96-1527 (a state court case). Upon release from imprisonment,  
24 the defendant shall be on supervised release for a term of two (2)  
25 years and may face deportation.

26 On March 18, 2011, the defendant petitioned this court for a  
27 modification of consecutive sentence. (Docket No. 23) He moves  
28 this court for an order modifying his federal sentence so that it

1 would run concurrently with his state court sentence and, upon his  
2 release from state prison, that he be deported immediately. *Id.*

3       The court construes the defendant's petition as a motion for  
4 modification of sentence under 18 U.S.C. § 3582©. "The court may  
5 not modify a term of imprisonment once it has been imposed except"  
6 in certain circumstances. 18 U.S.C. § 3582©. The court may modify  
7 a prisoner's sentence: (1) "upon motion of the Director of the  
8 Bureau of Prisons,... if it finds that...extraordinary and  
9 compelling reasons warrant such a reduction; or ... the defendant  
10 is at least 70 years of age, has served at least 30 years in prison  
11 ... for the offense or offenses for which [he] is currently  
12 imprisoned, and a determination has been made ... that [he] is not  
13 a danger to ...[others and] the community," (2) "to the extent  
14 otherwise expressly permitted by statute or by Rule 35 of the  
15 Federal Rules of Criminal Procedure," and (3) "in the case of a  
16 defendant who has been sentenced to a term of imprisonment based on  
17 a sentencing range that has subsequently been lowered[, ]... upon  
18 motion of the defendant[, ] the Director of the Bureau of Prisons,  
19 or ... the court." 18 U.S.C. § 3582(c)(1)-(2).

20       The defendant has not met the criteria for a modification of  
21 sentence. First, the Director of the Bureau of Prisons did not  
22 petition the court to modify the defendant's sentence on the basis  
23 of the defendant's age, the length of his prison term, or because  
24 he no longer presents a danger to others and the community. 18  
25 U.S.C. § 3582(c)(1)(A). The defendant is not "at least 70 years of  
26 age." *Id.* He was 31 in 1999, and must now be in his early forties.  
27 He has not "served at least 30 years in prison" for the offense at  
28 issue. *Id.* He was sentenced by this court in January of 2000 to

1 under six years imprisonment to run consecutively to his state  
2 court case.<sup>1</sup> It has not been asserted that the defendant is no  
3 longer a threat to society. *Id.* Second, the court finds no basis  
4 to modify the defendant's imposed term of imprisonment that is  
5 "otherwise expressly permitted" by statute or Federal Rule of  
6 Criminal Procedure 35. 18 U.S.C. § 3582(c)(1)(B). Third, the  
7 defendant's term of imprisonment was not "based on a sentencing  
8 range that has subsequently been lowered." 18 U.S.C. § 3582(c)(2).

9 In addition, to the extent the defendant requests that this  
10 court expedite any removal proceedings he may be subject to upon  
11 his release from prison, this court does not have authority to  
12 grant that relief. Only the Attorney General of the United States  
13 has the authority to remove an alien. 8 U.S.C. § 1231(a)(4)(A) (the  
14 Attorney General may not remove an alien who is sentenced to  
15 imprisonment until the alien is released from imprisonment); 8  
16 U.S.C. § 1231(a)(4)(B) (the Attorney General is authorized to remove  
17 an alien, if the Attorney General determines that the alien is  
18 confined pursuant to a conviction for a nonviolent offense, or the  
19 alien's removal is appropriate and in the best interest of the  
20 United States); *Tamayo v. Holder*, 2009 WL 2488032 (C.D.Cal.  
21 2009) (court lacked authority to initiate deportation order); *United*  
22 *States v. Tinoso*, 327 F.3d 864, 866 (9th Cir. 2003) (determination  
23 of whether an alien is subject to deportation resides in the  
24 Executive Branch). Furthermore, "a district court cannot *sua*  
25 *sponte* issue a deportation order without a request from the United  
26 States Attorney." *United States v. Marin-Castaneda*, 134 F.3d 551,

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28 <sup>1</sup> The state court case originated in 1996.

1 556 (3d Cir. 1998) (district court lacked authority to depart  
2 downward in sentence because of Attorney General's statutory power  
3 to deport alien before completion of prison term). Lastly,  
4 imprisoned aliens or those on supervised release have no private  
5 right to speedy removal. 8 U.S.C. § 1231(a)(4)(D) (aliens  
6 "imprisoned, arrested, or on parole, supervised release, or  
7 probation" cannot assert a cause or claim "under this paragraph  
8 against any official of the United States or of any State to compel  
9 the release, removal, or consideration for release or removal of  
10 any alien"); *United States v. Aispuro*, 127 F.3d 1133, 1134 (9th  
11 Cir. 1997) (an alien has no private right of action to compel the  
12 Attorney General to remove him from the United States prior to the  
13 completion of his sentence); *Tamayo*, 2009 WL 2488032 (no private  
14 right of action to compel deportation). Thus, this court does not  
15 have the authority to expedite or compel the defendant's removal  
16 proceedings.

17 Accordingly, the defendant's motion for modification of  
18 consecutive sentence (#23) is DENIED.

19 It is so ORDERED.

20 DATED: This 6th day of April, 2011.

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23 UNITED STATES DISTRICT JUDGE  
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